Introduction

In economic theory, "perfect information" with regard to prices and product characteristics is one of many idealized conditions that must exist for markets to efficiently allocate resources. In practice, consumers need product information to make informed choices. Where that information is costly for consumers to obtain, government intervention may improve market efficiency.

As the country moves toward retail competition in electricity, consumers will be asked to choose between competing suppliers of electricity and related services. Because electricity is unseen and intangible, consumers will have no practical method to determine the fuel sources used by those suppliers or to verify claims made about such sources without some type of disclosure requirement, such as standard labeling practices. For consumers who are concerned about the environmental, economic and national security implications of various fuel sources, requiring suppliers to disclose their fuel mix and the air emissions generated by that mix, as well as price and price volatility information, will be critically important to making informed choices. Because consumers will have more confidence in verified labeling than in advertising claims, and because advertising may be misleading, disclosure requirements also will be important to retail suppliers whose resource portfolios would be judged more favorably by consumers than those of their competitors.

Some retail suppliers may have concerns about disclosure requirements, including (1) concerns that proprietary information, i.e., "trade secrets," will be divulged in the process, (2) concerns about the potential administrative complexity and cost of tracking fuel sources and emissions and (3) an unwillingness to reveal unpopular fuel sources and high emissions rates. This paper addresses the legal and policy aspects of the first concern. The issues addressed are:

- What constitutes a trade secret?
- What are the policy principles that have guided disclosure requirements in other areas of commerce?
- How have trade secrets been defined and balanced with the public interest in particular cases, and how have the courts ruled?
- Are the fuel mix and emissions profile of a retail supplier's overall portfolio likely to be considered a trade secret?
- How might public and private interests be balanced in the retail electricity market?
- What existing disclosure and truth-in-advertising laws might be applied to the retail electricity "product"?
- Would a new federal law be desirable?

The task for regulators and legislators is to maximize the range and quality of information while not unduly jeopardizing a market participant's valid expectation of nondisclosure where a trade secret is at issue.

What Constitutes a Trade Secret?

There is no single, accepted definition of a trade secret in either federal or state law.[1] On the broadest level, a trade secret is nothing more than a property right in intangible property. The owner of a trade secret has the right to prevent unauthorized use and disclosure by those who have access to such trade secrets. See Roger M. Milgrim, *Milgrim on Trade Secrets* §12.02 (Release No. 54, Nov. 1996) [hereinafter "*Milgrim*"]. Those rights are the owner's "property", and they are derived from the common law of the several states. See Id.; *Ruckelshaus vs. Monsanto Co.*, 456 U.S. 986 (1984) [hereinafter "*Ruckelshaus*"]. Therefore, based upon such a property interest, an owner of a trade secret may have a direct Fifth Amendment cause of action against the government for wrongful use or disclosure of trade secrets. *Milgrim* at §12.02.

Attempting to define the concept with greater precision has been difficult. There is general agreement that simply dubbing information as a "trade secret" will not automatically trigger the exemptions and protections from disclosure that might be afforded to legitimate trade secret information in regulatory and ratemaking proceedings.[2] Once the analysis goes beyond that point, however, there is far less clarity.

A conceptual definition of trade secrets is found in the *Restatement of Torts*:[3]

> A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business, as, for example, the amount or other terms of a secret bid for a contract . . . A trade secret is a process or device for continuous use in the operation of the business.[4]

The same source describes a six-prong test for determining whether something is a trade secret:

> An exact definition of a trade secret is not possible. Some factors to be considered in determining whether given information is one's trade secret are: (1) The extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.[5]

Equally important in defining a trade secret is determining what does *not* constitute a trade secret. Providing reasoning that is particularly relevant to the issue of disclosing the fuel mix

and emissions associated with electricity supplies, the Supreme Court said, in a footnoted discussion in *Ruckelshaus*,

> [w]e emphasize that the value of a trade secret lies in the competitive advantage it gives its owner over competitors. Thus, it is the fact that operation of the data-consideration or data-disclosure provisions will allow a competitor to register more easily its product or to use the disclosed data to improve its own technology that may constitute a taking. *If, however, a public disclosure of data reveals, for example, the harmful side effects of the submitter's product and causes the submitter to suffer a decline in the potential profits from sales of the product, that decline in profits stems from a decrease in the value of the pesticide to consumers, rather than from the destruction of an edge the submitter had over its competitors, and cannot constitute the taking of a trade secret.*[6]

In the end, whether information is to be considered a trade secret is largely a matter of achieving a balance between the competing underlying interests. Determining that balance is a matter that is resolved on a case-by-case basis by policymakers and their administrative agencies, rather than by the courts. (Of course, the courts often are left to ascertain whether a particular agency's disclosure requirement is consistent with the legislatively achieved balance.) In *Ruckelshaus*, the Court stated:

> The proper inquiry before this Court is not whether the provisions in fact will accomplish their stated objectives. Our review is limited to determining that the purpose is legitimate and that Congress rationally could have believed that the provisions would promote that objective. . .It is enough for us to state that the optimum amount of disclosure to the public is for Congress, not the courts, to decide, and that the statute embodies Congress' judgment on that question.[7]

Therefore, the best guidance for what policymakers may deem to be an "optimum amount of disclosure" comes from a review of the balancing that has been done in other industries and product markets. Several case examples are provided in the following two sections.

Policy Principles Guiding Disclosure Requirements in Other Areas of Commerce

As described in the previous section, it is up to policymakers to decide what constitutes a trade secret. In passing disclosure laws, policymakers at every level of government have explicitly recognized that consumers need access to information for competitive markets to work. Consider the language Congress included in its policy declaration at the outset of the Fair Packaging And Labeling Act (FPLA):

> Informed consumers are essential to the fair and efficient functioning of a free market economy. Packages and their labels should enable consumers to obtain accurate information as to the quantity of the contents and should facilitate value comparisons. Therefore, it is hereby declared to be the policy of the Congress to assist consumers and manufacturers in reaching these goals in the marketing of consumer goods.[8]

The Food and Drug Administration (FDA) and the Federal Trade Commission have extensive enforcement authority under the FPLA.[9] As a result, products ranging from cereal to cosmetics now include disclosures that allow consumers to know what they are buying, and to compare the value of competing choices. Before adoption of the FPLA, consumers could only guess what was in a product or if the product contained the ingredients that it claimed. The FDA is perhaps the foremost example of an agency that has to make tradeoffs between expectations of maintaining trade secrets and the public's need to know.

Other examples of disclosure requirements include the following.

- In a memorandum to the Administrator of the EPA and the heads of the Executive Departments and Agencies, President Clinton stated:

  > Community Right-to-Know protections provide a basic informational tool to encourage informed community-based environmental decision making and provide a strong incentive for businesses to find their own ways of preventing pollution.[10]

- In early 1996, FERC rejected a request to cease the public disclosure of information that had been included in the discount rate reports filed by regulated gas pipeline companies:

  > [P]ublic reporting of discount rate information permits FERC, as well as other interested parties, to maintain a vigil against discriminatory pricing. Making it more difficult to access this information will diminish the ability of the Commission and the public to discover problem deals.[11]

- State utility commissions have recognized that disclosure of sensitive information may be required to make a competitive market work. The California PUC addressed the matter in regard to discounts offered for service in the intra-LATA telecommunications market:[12]

Markets thrive when the prices that buyers and sellers arrive at are widely known, and suppressing price information will lead to less efficient markets.

- The Federal Truth-in-Lending Act requires that lending terms be disclosed on documents in a certain type size in a particular location to assure prominence, as well as the use of certain common terms to achieve consistency between disclosures.

In short, there is widespread recognition of the concept that the goal of full and fair competition cannot be advanced by withholding important information from the marketplace.

Balancing Trade Secrets and the Public Interest

This section discusses specific cases where trade secrets have been defined and where those interests have been balanced against the public interest by legislatures and state agencies.

Federal Emergency Planning and Community Right-to-Know Act

The federal Emergency Planning and Community Right-to-Know Act[13] lists specific factors that must be present before information will be entitled to protection as a trade secret. Among other things, this act established programs to provide the public with important information about the hazardous and toxic chemicals in their communities. Section 11042 grants the administrator of the EPA authority to allow the withholding of specific chemical identity information if the person seeking to withhold establishes that the information constitutes a trade secret. Subsection (b) identifies the four factors that will establish a trade secret:

- Such person has not disclosed the information to any other person, other than [government officials, employees, or persons bound by a confidentiality agreement], and such person has taken reasonable measures to protect the confidentiality of such information and intends to continue to take such measures.

- The information is not required to be disclosed, or otherwise made available, to the public under any other federal or state law.

- Disclosure of the information is likely to cause substantial harm to the competitive position of such person.

- The chemical identity is not readily discoverable through reverse engineering.[14]

A similar definition of trade secrets is found in the California Government Code. The state's Public Records Act addresses trade secrets as the concept applies to air pollution. All information related to air contaminants or other pollution that is reported to any government agency is deemed a public record subject to disclosure. Trade secrets are excepted from this disclosure requirement. The adopted definition is:

> "Trade secrets," as used in this section, may include, but are not limited to, any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented, which is known only to certain individuals within a commercial concern who are using it to fabricate, produce, or compound an article of trade or a service having commercial value and which gives its user an opportunity to obtain a business advantage over competitors who do not know or use it.[15]

Federal Energy Regulatory Commission

FERC has recently reaffirmed the public reporting of discount rate information.[16] The Natural Gas Act requires a pipeline company to report certain information to FERC, including a

shipper's name and the terms of the shipping contract.[17] Two pipeline companies objected to this level of disclosure, arguing that it unduly compromised trade secrets. They presented FERC with the option to cease the public disclosure of information that had been included in the discount rate reports filed by regulated gas pipeline companies, and substitute customer codes for customer names to protect the confidentiality of customer-specific information.

FERC rejected the request. The discount rate information was found to be necessary to the agency's efforts to prevent discriminatory pricing. The customer names serve a similar purpose by enabling competing shippers to determine whether they are entitled to similar treatment. Therefore FERC concluded that the interests of the emerging competitive market outweighed the interests of particular participants in that market to maintain the confidentiality of the terms of their transactions or the identity of those with whom they were conducting business.

Nuclear Regulatory Commission

Agencies have, in some cases, been able to achieve sufficient disclosure by pursuing alternatives to the disclosure that involves trade secrets. After the Three Mile Island accident, for example, the NRC sought to pursue its concerns about the safety of certain tube-sleeving practices used in a large number of nuclear power plants. To this end, the agency sought to have manufacturers report certain data regarding their tube-sleeving practices. The agency intended to release the results of the safety tests that applied to the tube-sleeving process. Westinghouse, one of the main manufacturers of the plants and much of the equipment used in them, claimed that its tube-sleeving process was proprietary, and the release of specific testing information would help its competitors draw useful inferences about that process.

The NRC determined that its purposes in collecting and releasing the data would be satisfied if, instead of collecting the results of the Westinghouse-specific tests, it used data from several commonly performed safety tests that are routinely performed by Westinghouse and its competitors. The agency determined that release of such information would not compromise important Westinghouse proprietary information. Whatever interest Westinghouse had in preventing the release of such "routine, non-revealing" tests was found to be less important than the public interest in release of such information.

Energy Information Administration

Another such compromise with competing interests is embodied in the data collection practices of the Energy Information Administration (EIA). One hundred companies submit monthly data to EIA on the location, ownership, capacity and operations—including injections, withdrawals and inventories—of all active underground gas storage fields. The data is provided on an aggregate, company-wide basis, and is critical to the agency's efforts to understand system deliverability and overall operations. The agency recently proposed collecting the data on a reservoir-specific basis; each company would be required to report the data for each reservoir in which it held an interest. The gas industry sharply criticized the proposed change because it potentially could cause them substantial competitive harm. Field-specific storage data could give gas suppliers an unfair competitive advantage over the storage operator in negotiating the sale of gas to that storage operator or those customers that have contrac-

tual rights to that storage facility. The notion of equal bargaining power is largely lost if the seller knows the storage operator's stocks are low. It appears that, at least for now, the agency will continue to rely on the current alternative of collecting aggregated data, thus protecting the storage operators from the competitive harm that additional disclosure could cause.

State Utility Commissions

Until recently, utility commission decisions regarding requests to keep information confidential were made in the context of utility franchises and protected market shares. With the prospect of retail competition, many utilities have become increasingly reluctant to disclose a variety of data that may affect their future competitive standing. In states where utility restructuring is under active discussion, confidential data filings appear to have increased both in scope and frequency.[18]

The evolution of the electric industry is requiring regulators to reexamine the criteria they use to judge the type of information that is appropriately withheld, i.e., what constitutes a "trade secret."[19] Although courts usually side with commissions when they have investigated claims of confidentiality and have ruled against them, utility requests for confidentiality often are honored by utility commissions.

When states seek to resolve questions of confidentiality, they generally employ a balancing test that weighs the public interest in disclosure against the harm to the disclosing party. Sometimes the balancing test appears in the statute. In Alaska, for example, the relevant statute provides that "[T]he commission shall order the information withheld from public disclosure if the information adversely affects the interest of the person making written objection and disclosure is not required in the interest of the public."[20]

Most commissions that have addressed the issue have required that any alleged harm from disclosure be described specifically. Mere allegations of harm are not enough. The District of Columbia Public Service Commission (PSC) construes the District's Freedom of Information Act (FOIA) as requiring the party seeking to invoke this exemption to show (1) that the party from whom the information was obtained faces actual competition, and (2) that disclosure will cause substantial competitive injury.[21]

The weight assigned to the public interest in disclosure is not absolute but, rather, fluctuates based on the importance of the function served by disclosure. The Arizona Corporation Commission, for example, addressed the issue in its rulemaking on Alternative Operator Service (AOS) providers in the telecommunications industry (Docket No. R-0000-93-056 Dec. No. 58421 (1993). The applicants for an AOS provider license sought to prevent the public disclosure of certain subscriber name and location information. The commission found that the information serves an important regulatory function, because it assists in the efficient investigation and remediation of end-user complaints. While noting that circumstances might arise that would justify proprietary treatment and nonpublic disclosure, the ACC found no such circumstances present and, therefore, required disclosure.

The Arizona case is an example of the extent of disclosure that can be called for even in the face of fairly compelling arguments that such disclosure impinges upon the company's com-

petitive opportunities. Identification of customers and service location for an optional service such as AOS is very valuable to any AOS competitor. Thus, the harm to the disclosing AOS provider would seem to be relatively high. The commission's regulatory purposes could have been adequately served by limiting disclosure to the commission and its staff, rather than full public disclosure. Still, the ACC determined that the balance of interests supported the full disclosure.

A recent survey[22] of utility commission practices regarding confidential data found six principal reasons why commissions have accepted electric utility claims of confidential data:

- The release of utility data would competitively or financially harm or disadvantage the utility and its customers.
- The data involved proprietary confidential business information (e.g., trade secrets) that needed to be protected.
- There was no convincing show of public interest in disclosure of the data.
- The need for keeping data confidential outweighed the public interest in disclosing the data.
- The administrative burden of evaluating each request for confidentiality is high.
- The protective order mechanism affords reasonable access for parties that desire access to the data.

The stated principal reasons for denying utility requests for confidentiality were:

- Retail competition in the electric power industry had not yet occurred. Therefore the utility had no legitimate competitive interest in withholding the information.
- The arguments for secrecy were based on too vague a definition of competition. In addition to identifying competitors and how specific information could be used by competitors to the detriment of the utility, the utility must provide empirical evidence of competition and how the release of the information would harm the utility.
- The information in question already was available to the public from other sources.
- The information in question was dated.
- The reasons for maintaining data as confidential were too broad or vague.
- Keeping the data confidential would give the utility an unfair competitive advantage over its competitors;
- Keeping demand-side management (DSM) data confidential would hurt PUC efforts to enhance the public's awareness of, and support for, DSM.

- The DSM data in question were needed to protect the public's right to full and accurate knowledge of utility DSM programs.

- Keeping rate data confidential would limit the public review needed to prevent price discrimination and other unfair practices.

Legal Challenges to Agency Disclosure of Trade Secrets

Ruckelshaus is a leading case on the issue of disclosure of potential trade secrets. In the case, the Court considered EPA data collection and release practices under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Under FIFRA, marketers desiring to sell any insecticide, fungicide or rodenticide were required to "register" their product by filing a report with the EPA setting forth both the active and inert ingredients in the product. This report was then made available to the public. Monsanto had sought to prevent the disclosure of the health, safety and environmental data it had submitted to the EPA as a trade secret.

In support of its demonstration that trade secret status was appropriate, the company emphasized the fact that the development of pesticides typically takes several years, and can be a 14-22 year process, with expenditures of millions of dollars in each of those years. The industry average is the achievement of success on 1 out of 20,000 tries for a new pesticide.

There was no dispute that the information submitted with an application usually has value to Monsanto beyond its instrumentality in gaining that particular application. Monsanto used this information to develop additional end-use products and to expand the uses of its other registered products. The information also would be valuable to Monsanto's competitors, who were seeking to achieve the same ends at lower costs wherever possible. For that reason, Monsanto had instituted stringent security measures to ensure the secrecy of the data.

The information at stake in *Monsanto* thus had all the hallmarks of trade secrets. It was the product of substantial investment of time and money, and not only defined the relevant product, but served a useful function for the development of future products. Given these arguments, Monsanto seemingly had reasonable, investment-backed expectations of nondisclosure. But the Supreme Court ruled that reporting according to the statutory guidelines adopted in FIFRA did not constitute a taking of Monsanto's property interest in its trade secrets. In so doing, the Court stated:

> In an industry that long has been the focus of great public concern and significant government regulation, the possibility was substantial that the Federal Government, which had thus far taken no position on disclosure of health, safety, and environmental data concerning pesticides, upon focusing on the issue, would find disclosure to be in the public interest. Thus, with respect to data submitted to EPA in connection with an application for registration prior to October 22, 1972, the Trade Secrets Act provided no basis for a reasonable investment-backed expectation that data submitted to EPA would remain confidential.[23]

As mentioned above, the Court also stated in a footnoted discussion that declines in profits stemming from a decrease in the value of the pesticide to consumers, rather than from the loss of a competitive edge, cannot constitute the taking of a trade secret.

Examples of the struggle between disclosure and trade secrets are also found in the energy industry. In *Pennzoil v. FPC*,[24] the agency sought to expand the information that was required to be reported about natural gas reserves. The information had been reported on an aggregated basis; the agency wanted reserves to be reported on a well-specific basis. The producers argued that the more specific data constituted trade secrets, in that production from an existing well often is relevant to the potential productivity of nearby tracts. Since those tracts often had not yet been leased by the federal government, public release of that information would allow companies who had not gone to the substantial expense of exploratory drilling to be equally positioned to estimate the worth of future leases. The FPC recognized the potential adverse economic effect of the new rule, but determined that it did not override the public interest in disclosure.

The reviewing court found that the FPC had failed to adequately articulate why disclosure was required. The matter was referred again to the FPC with the directive that the agency consider three additional factors in its analysis:

- Whether disclosure of this type of detailed information will significantly aid the commission in fulfilling its functions;

- The harm to the public generally from disclosure, in addition to the harm done to the producers,[25] and

- Most importantly, are there alternatives to full disclosure that will provide consumers with adequate knowledge but at the same time protect the interests of the producer.

Are the Fuel Mix and Emissions Profile of a Retail Supplier's Overall Portfolio Likely to Be Considered a Trade Secret?

Nature of Information to be Disclosed vs. Proprietary Interests of Suppliers

To make informed choices among competing retail electricity providers, consumers who are concerned about the price and environmental effects of their energy consumption would need to be provided with the following information:

- Current and future price (for some reasonable period of time) in a form that is comparable for all suppliers, or some statement about possible price volatility over time;
- Fuel mix of the supplier's generation portfolio (i.e., the percentage that comes from coal, nuclear, gas, oil, and hydropower and other renewables);[26] and
- Emissions characteristics of the supplier's generation portfolio.

In addition, some consumers might be interested in knowing the particular generation plants included within a supplier's portfolio, where there are concerns about the environmental effects of particular plants.

The proprietary interests of the retail provider would be those aspects of its business that give it a competitive advantage and that are unknown to its competitors. These might include:

- The cost of generating power at each supplier-owned facility;
- The prices, terms and conditions of power or fuel purchase contracts;
- The prices, terms and conditions of financial hedges (such as electricity futures contracts);
- Emissions control techniques that lower the cost of complying with environmental regulations; and
- Optimization of spot market power purchases and overall portfolio management.

There would seem to be no intersection between what the consumer needs to know to make an informed choice among competing retail electricity providers and the proprietary interests of the retail seller. That is, disclosing the fuel mix and emissions characteristics (as well as comparable price information, which is not the subject of this report) of the supplier's power portfolio would not appear to reveal any proprietary information.

However, it might be argued that the fuel mix itself, and how it changes over time, reveal a proprietary fuel strategy (i.e., a trade secret) that allows the supplier to lower costs. Such

arguments may have little credibility, given that fuel mix is a relatively simple and obvious tool, especially compared to the business techniques listed above. This argument would be weakened further if plant-specific information is not publicly disclosed (although it may be collected to allow the administering agency to verify accurate disclosure of the overall portfolio). In addition, competitors may be able to gather some or all of the fuel-mix information from other sources (e.g., the sources listed in the following section).

It also might be argued that the emissions profile reveals a proprietary emissions control strategy. Again, competitors may be able to gather some or all plant-specific information from other sources, and this concern could be mitigated if plant-specific information were not publicly disclosed.

Even if the above or other arguments put forward by suppliers proved persuasive, the public interest in disclosing such information could be judged by policy-makers to outweigh the associated proprietary interests. As indicated above, the collection and public dissemination of far more specific and valuable information in other industries has been held not to outweigh the public interest in disclosing such information.

Plant-Specific Information Collected by State and Federal Agencies

The information that would be required for fuel mix and emissions disclosure already is being collected by public agencies and, in most cases, is publicly reported.[27] This fact dilutes arguments against disclosure and, in many cases, calls into question the accuracy of the term "disclosure." Some examples of existing information requirements imposed on electricity generators and suppliers are described in another report in this series: *Full Environmental Disclosure for Electricity: Tracking and Reporting Key Information*. They include the Environmental Protection Agency's "continuous emissions monitoring requirements" for the purpose of enforcing environmental protection regulations relating to power plants, the Energy Information Administration's collection of power plant data including fuel type and the Federal Energy Regulatory Commission's collection of data on wholesale electricity transactions.

Discussion and Recommended Policy Action

Balancing Public and Private Interests in the Retail Electricity Market

As discussed above, the amount of deference appropriately afforded to trade secrets depends largely upon the purpose served by release of the information at issue. If the public interest in disclosure is great enough, legislatures and agencies have provided for (and courts have approved) that release even if it causes the distinct appearance of a loss of competitive advantage.

The *Pennzoil* case, however, holds that a mere assertion that the public interest is served by disclosure is not enough. Some demonstration of the effect of disclosure on the competitive market must be shown.

The *Ruckelshaus* case may be read as providing that if, as a result of information disclosure, some electricity suppliers suffer a decline in potential profits from the sale of their product (because consumers opt for cleaner and more sustainable sources of electricity), the decline is nothing more than a product of consumers expressing their choice in a competitive market, rather than a result of the loss of an edge the producer had over its competitors.

The logic of *Pennzoil* could be especially helpful where either FERC or a state agency presently is collecting reports that generally address the type of information for which disclosure is now sought. The agency could require that more precise information be reported for ultimate public release, so long as the three considerations from *Pennzoil* are made. As stated above, these considerations include:

- Whether disclosure will significantly aid the agency in fulfilling its functions;
- The harm to the public generally from disclosure, in addition to the harm done to the producers; and
- Whether there are alternatives to full disclosure that will provide consumers with adequate knowledge while protecting the interests of the producer.

With regard to the first, if one agency function is to encourage the development of competitive markets, this criterion should be easy to meet. Regarding the second, it is difficult to imagine a convincing argument that public harm would arise from such disclosure in the electricity industry.[28] The third criterion, whether alternatives to disclosure are available, will be determined by the clarity of definition that is brought to the information for which disclosure is sought. If a link is successfully established between the information and the proper development of a competitive retail market, it is less likely that any alternative form of disclosure would serve that purpose.

The following arguments support policy that requires fuel mix and emissions disclosure:

- The information will significantly aid consumers in making choices in the competitive

electricity market and provide suppliers with appropriate market signals. By allowing consumer preferences to be expressed in the marketplace, market efficiency is improved;

- By improving market efficiency, the information is likely to reduce environmental costs to society,[29]

- Any harm to producers will result not from the loss of a competitive edge, but from selling a product that consumers are less interested in buying; and

- There is no adequate substitute for the knowledge that will be gained from the information for which disclosure is sought.

Given the public interest in developing a retail market that provides meaningful choices to all consumers and the demonstrated interest of consumers in choosing electricity services based on energy source and environmental effects, the public interest in disclosure is likely to outweigh interests in maintaining confidentiality.[30]

Existing Federal Truth-in-Advertising and Disclosure Laws that Might be Applied to the Retail Electricity "Product"

Labeling requirements and truth-in-advertising laws are complementary. Labeling provides immediate, standardized information on all like products, which allows informed comparison shopping. Truth-in-advertising laws deter industry from making false and misleading claims in their advertisements and even in required disclosure labels.

Fair Packaging and Labeling Act

The Fair Packaging And Labeling Act[31] grants the Food and Drug Administration (FDA) and the Federal Trade Commission (FTC) extensive authority to require the disclosure of information on product packages.[32] It states:

> It shall be unlawful for any person engaged in the packaging or labeling of any consumer commodity (as defined in this Act) for distribution in commerce . . . to distribute or cause to be distributed any such commodity if such commodity is contained in a package, or if there is affixed to that commodity a label, which does not conform to the provisions of this Act and of regulations promulgated under the authority of this Act.[33]

The FPLA applies to any "consumer commodity" that is not specifically excepted.[34] Meat, tobacco, poultry, pesticides, certain drugs, alcoholic beverages and seeds are the only commodities for which exceptions are provided in the statute. Although the FPLA does not make an exception for electricity, the FPLA would not apply to electricity because the law applies only to packaged goods.[35]

Federal Trade Commission's Guidelines for Environmental Marketing Claims

Section 5 of the Federal Trade Commission Act ("FTC act") broadly prohibits unfair or deceptive advertising claims.[36] The FTC has created more specific guidelines for interpreting section 5 in the area of environmental marketing. The guidelines, set forth in the Code of

Federal Regulations at 16 CFR Part 260, state, in part:

> Any party making an express or implied claim that presents an objective assertion about the environmental attribute of a product or package must, at the time the claim is made, possess and rely upon a reasonable basis substantiating the claim. A reasonable basis consists of competent and reliable evidence. In the context of environmental marketing claims, such substantiation will often require competent and reliable scientific evidence, defined as tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.[37]

These and the other industry guidelines that the FTC issues serve as the agency's interpretation of the laws it administers. They provide the basis for voluntary compliance with the laws by members of industry. While the guides are not legislative rules under section 18 of the FTC act, and thus do not have the force and effect of law, the FTC may take action, under section 5 of the FTC act, against any conduct inconsistent with the positions articulated in the guides if it believes that the conduct is unlawful under the terms of the FTC act. The guides do not preempt regulation governing the use of environmental marketing claims by other federal agencies or by state and local bodies.

The FTC's environmental marketing guidelines apply to all forms of marketing products to the public, whether through advertisements, labels, package inserts or promotional materials. The guides apply to any claim about the environmental attributes of a product or package in connection with the sale, offering for sale or marketing of such product or package for personal, family or household use, or for commercial, institutional or industrial use.

The guidelines include four general principles that apply to all environmental marketing claims:

- Qualifications and disclosures should be sufficiently clear and prominent to prevent deception;
- Claims should make clear whether they apply to the product, the package or a component of either;
- Claims should not overstate an environmental attribute or benefit, expressly or by implication; and
- Comparative claims should be presented so that the basis for the comparison is sufficiently clear to avoid consumer deception.

All of these general guidelines would apply to environmental marketing claims associated with electricity sales.

The guidelines also address eight specific categories of environmental claims: general environmental benefits, "degradable," "compostable," "recyclable," "recycled content," "source

reduction," "refillable," and "ozone safe"/"ozone friendly." Of these, the guidelines for making claims regarding general environmental benefits is the only one applicable to sales of electricity.[38] These guidelines state that:

> It is deceptive to misrepresent, directly or by implication, that a product or package offers a general environmental benefit. Unqualified general claims of environmental benefit are difficult to interpret, and depending on their context, may convey a wide range of meanings to consumers. In many cases, such claims may convey that the product or package has specific and far-reaching environmental benefits. As explained in the Commission's Ad Substantiation Statement, every express and material, implied claim that the general assertion conveys to reasonable consumers about an objective quality, feature or attribute of a product must be substantiated. Unless this substantiation duty can be met, broad environmental claims should either be avoided or qualified, as necessary, to prevent deception about the specific nature of the environmental benefit being asserted.[39]

The guides provide several examples to help illustrate this principle. For example, the guides specifically address the use of environmental seals, logos or third-party certification, through the following example:

> Example 5: A product label contains an environmental seal, either in the form of a globe icon, or a globe icon with only the text "Earth Smart" around it. Either label is likely to convey to consumers that the product is environmentally superior to other products. If the manufacturer cannot substantiate this broad claim, the claim would be deceptive. The claims would not be deceptive if they were accompanied by clear and prominent qualifying language limiting the environmental superiority representation to the particular product attribute or attributes for which they could be substantiated, provided that no other deceptive implications were created by the context.

It is possible that guidelines relating specifically to the electricity industry will be developed at some point in the future. However, guidelines are issued only in response to deceptions that are known to be widely occurring in the marketplace and are likely to take at least one year to develop. In the meantime, the guidelines that relate broadly to environmental claims offer some useful guidance to the electric industry and could help deter misleading claims.

How Might a New Law be Crafted?

There are several reasons a new federal law might be desirable:

- If retail sellers have legitimate trade secret interests, those that outweigh the public interest in disclosing such information could be defined. For example, those claiming trade secrets might be required to prove some or all of the following:

  - ❑ The information has not been disclosed to any other person (other than government officials, employees, or persons bound by a confidentiality agreement, and

such persons have taken reasonable measures to protect the confidentiality of such information and intend to continue to take such measures);

- ❑ Measures have been taken to guard the secrecy of the information;
- ❑ The information has significant value to the claimant and to his competitors;
- ❑ The information is not required to be disclosed, or otherwise made available, to the public under any other federal or state law, and is not easily discoverable through other means;
- ❑ Disclosure of the information is likely to cause substantial harm to the competitive position of such person; and
- ❑ Alternative data collection and disclosure methods could achieve the same end.

- Existing product labeling laws do not extend to electricity sales and there are no truth-in-advertising regulations or guidelines that apply specifically to sales of electricity.
- Especially if federal electric industry restructuring legislation imposes any requirements relating to consumer protection on retail electric sellers (or instructs states to do so), such as licensing requirements, it may be useful to add fuel mix and emissions disclosure requirements, perhaps conditioning the issuance of licenses on such disclosure.

On the last point, linking disclosure to the "voluntary" participation in a market is an additional way to deflate trade secrets claims. This is the strategy embodied in FIFRA, the subject of the *Ruckelshaus* case. The statute requires that pesticide developers "register" their data with the EPA; the data is then public information. The Supreme Court noted that Monsanto had the option of not registering its products, or any particular product. While this would prevent the company from marketing the unregistered product in the United States, it would have no effect on the ability to market it internationally. The Court concluded its discussion on this point by noting:

> As long as [Monsanto] is aware of the conditions under which the data are submitted, and the conditions are rationally related to a legitimate Government interest, a voluntary submission of data in exchange for the economic advantages of a registration can hardly be called a taking.[40]

The *Ruckelshaus* logic could serve in the case of electricity disclosures: any competitor that wants the opportunity to participate in a competitive retail electric services market must register, and one required disclosure for registration is the resource mix and associated emissions reflected in its service package and identification of the specific generation plants included in that mix for purposes of verification.

Notes

1. While there is a Uniform Trade Secrets Act that has been enacted in many jurisdictions, it establishes a party's right to maintain a trade secret in confidentiality or be compensated for disclosure without ever defining what constitutes a trade secret.

2. See, for example, *Wisconsin Electric Power Co. vs. Public Service Commission*, 110 Wis.2d 530, 329 N.W.2d 178 (1983).

3. This source of general principles, published by the American Law Institute, is often cited by courts but is not on its own authoritative.

4. *Restatement of Torts*, §757, comment b (1939).

5. Ibid.

6. *Ruckelshaus*, fn. 15 (emphasis added).

7. *Ruckelshaus*, at 1014-16.

8. 15 U.S.C. §1451.

9. 15 U.S.C. 1450, et seq.

10. Presidential Memorandum of August 8, 1995, 60 Fed. Reg. 41791, citing the Emergency Planning and Community Right-to-Know Act of 1986 (42 U.S.C. 11001-11050) and the Pollution Prevention Act of 1990 (24 U.S.C. 13101-13109).

11. FERC Order No. 581-A (Feb. 29, 1996).

12. The intra-LATA market is service provided within the state, but beyond the local calling territory.

13. 42 U.S.C. 11001-11050.

14. The administrator of the EPA is charged with determining whether these factors have been adequately established.

15. California Government Code, §6254.7(d).

16. FERC Order No. 581-A.

17. 15 U.S.C. 717c(c).

18. Edward Vine, *Confidential Data in a Competitive Utility Environment: A Regulatory Perspective*. Lawrence Berkeley National Laboratory, LBL-38622 (August 1996).

19. As discussed in section 2, there is no single definition of a "trade secret." Definitions generally include any information or data that aids the competitive position of the utility, as long as other criteria are satisfied.

20. AS 42.06.445(d).

21. Georgetown University, Order No. 9898 (1993).

22. Ibid.

23. 467 U.S. at 1008-1009.

24. 534 F.2d 627 (5th Cir. 1976)

25. Some producers had argued that the loss of exclusive knowledge of gas reserves would cripple one of the major incentives for gas exploration, which eventually would drive up the market price of gas. Since the FPC had accepted similar arguments in an earlier matter, the Court found the agency should have more directly addressed the argument here.

26. Consumers who are purchasing a "premium blend" drawn from the supplier's portfolio should know the fuel mix and emissions characteristics of that blend, and should also be confident that the premium segment of the portfolio is being sold only once. This would require each kilowatt-hour of the premium segment to be accounted for and apportioned among premium customers. This subject falls more into the category of administrative issues related to disclosure, and will not be discussed as a separate legal issue.

27. Note that, even if not disclosed to the public, providing proprietary plant-specific information to an agency remains of concern to businesses for two reasons. First, there is a fundamental risk that governmental employees will misuse the information they attain while at work. Milgrim writes, "[l]ike it or not, federal employees are not less corruptible than their private sector peers." (*Milgrim* at 12.02). Although there are penalties for those who misappropriate trade secrets, e.g., the Federal Trade Secrets Act, there remains a problem of proof. In addition to the potential of overt corruption, an employee could inadvertently transfer information to the private sector during or after government service, which can be difficult to prove. Second, the Freedom of Information Act (FOIA) is a concern. Under FOIA, except for certain exceptions, anyone may obtain access to federal agency records. Accordingly, there is always a danger to those that own a trade secret that such information may be disclosed to the public. Congress, recognizing such a threat, included three exemptions designed to prevent such an event from occurring. Section 552(b)(3) was intended to continue the protection afforded by several other federal statutes regulating disclosure, some of which offered protection to trade secrets held in federal files. Section 552(b)(4) exempts any matters that were trade secrets and commercial or financial information obtained from a person and privileged and confidential. Lastly, section 552(b)(9) exempted geological and geophysical

28. Perhaps an argument could be made that there would be adverse economic effects if fossil plants are shut down.

29. Although disclosure does not require suppliers to internalize external environmental costs, it allows consumers to express their preference for suppliers whose external costs are lower. Thus, disclosure will create market demand that will move the market in the same direction as would laws that impose external costs on their source. However, even with full disclosure, the well-established market failure known as "public goods"—i.e., that consumers generally will not pay for goods when they do not personally reap the benefits—can be expected to significantly dampen demand compared to the sum of individual preferences.

30. Of course, any claim that a "trade secret" is at stake should be closely reviewed to determine whether the seller or producer has a valid investment-backed interest in maintaining the confidentiality of the underlying information. Where no such interest exists, the claim should be deemed invalid.

31. 15 U.S.C. 1450, et seq.

32. The FDA has jurisdiction over food, cosmetics, drugs and devices. The FTC has jurisdiction over all other products.

33. Sec. 3(a) 15 USC 1452(a).

34. The act currently covers any article, product or commodity of any kind or class that is customarily produced or distributed for sale through retail sales agencies or instrumentalities for consumption by individuals, or use by individuals for purposes of personal care or in the performance of services ordinarily rendered within the household (15 U.S.C. 1459(a)).

35. For example, while the law applies to canned vegetables, it does not apply to fresh vegetables because they are not packaged. Since the bill for fresh vegetables does not constitute packaging, the argument that the electricity bill is in effect its "package," and thus that electricity should be covered under the law, is not likely to be persuasive.

36. 15 U.S.C. 45.

37. 16 CFR, Sec. 260.5.

38. Some other guidelines may apply, however, to claims that do not relate to the sources of electricity, such as the paper used in billing statements.

39. 16 CFR, Sec. 260.7 (a).

40. 467 U.S. at 1008.

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U.S. Department of Energy. *Clean Cities Guide to Alternative Fuel Vehicle Incentives & Laws.* Washington, D.C.: U.S. Department Of Energy, November 1995.

On-Line Resources

Alternative Fuels Data Center
http://www.afdc.doe.gov/

CALSTART
http://www.calstart.org/

Environmental Resources: Alternative Fuels and Energy
http://spot.colorado.edu/~jobem/energy.htm

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U.S. Department of Energy Clean Cities Program
http://www.ccities.doe.gov/

Selected Trade Associations

American Methanol Institute
800 Connecticut Avenue, N.W., Suite 620
Washington, D.C. 20006
(202) 467-5050
fax: (202) 331-9055

American Petroleum Institute
1220 L Street, N.W.
Washington, D.C. 20005
(202) 682-8213
fax: (202) 682-8296

Electric Transportation Coalition
701 Pennsylvania Avenue, N.W.
Fourth Floor—East Building
Washington, D.C. 20004
(202) 508-5995
fax: (202) 508-5924

Electric Vehicle Association of the Americas
601 California Street, Suite 502
San Francisco, Calif. 94108
(415) 249-2690
fax: (415) 249-2699

National Clean Cities Coalition
U.S. Department of Energy
Forrestal Building, EE-33
1000 Independence Avenue, S.W.
Washington, D.C. 20585
(202) 586-8161
fax: (202) 586-1558

National Biodiesel Board
1907 Williams Street, Suite B
P.O. Box 104898
Jefferson City, Mo. 65110-4898
(800) 841-5849
fax: (573) 635-7913

National Ethanol Vehicle Coalition
1648 Highway 179
Jefferson City, Mo. 65109-9020
(573) 635-8445
fax: (573) 635-5466

Natural Gas Vehicle Coalition
1515 Wilson Boulevard, Suite 1030
Arlington, Va. 22209
(703) 527-3022

National Propane Gas Association
1600 Eisenhower Lane, Suite 100
Lisle, Ill. 60532
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Contents

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Scott Hempling is a legal advisor on electric restructuring to state commissions, consumer advocates, municipalities and independent power producers. He holds a B.A. cum laude from Yale University and a J.D. magna cum laude from Georgetown University Law Center.

Executive Summary

As the country moves toward retail competition in electricity, consumers will be asked to choose between competing suppliers of electricity and related services. For consumers who are concerned about the environmental, economic and national security implications of various fuel sources, requiring suppliers to disclose their fuel mix and the air emissions generated by that mix, as well as price and price volatility information, will be critically important to making informed choices.

Some retail suppliers may be concerned that disclosing this information will result in "trade secrets" being divulged. This paper addresses the legal and policy aspects of this concern and makes the following conclusions.

The amount of deference appropriately extended to trade secrets depends largely on the purpose served by release of the information at issue. When the public interest in disclosure is great enough, legislatures and agencies have provided for (and courts have approved) the release of information—even if such a release caused the distinct appearance of a loss of competitive advantage.

The public interest in developing a retail market with meaningful choices for all consumers, together with the demonstrated interest on the part of some consumers to choose their electricity services based on energy source and environmental effect, suggests that the public interest in disclosure is likely to outweigh the interest in maintaining confidentiality.

Labeling requirements and truth-in-advertising laws are complementary. Labeling provides immediate, standardized information on all like products. This supports informed comparison shopping. Truth-in-advertising laws deter industry from making false and misleading claims in their advertisements and in required disclosure labels.

Foreword

The National Council and its Research Agenda

The National Council on Competition and the Electric Industry initiated its Consumer Information Disclosure Project in November 1996 to assist state regulators and legislators address consumer information needs in a competitive electricity environment. This effort followed the National Association of Regulatory Utility Commissioners' November 1996 resolution calling for enforceable, uniform standards that would allow retail consumers to easily compare price, price variability, resource mix, and the environmental characteristics of their electricity purchases.

To implement this resolution, the National Council has initiated a multi-part research agenda. The research agenda is designed to identify and provide state regulators and legislators with technical information, consumer research and policy options. The tasks currently being undertaken are described below. A report, describing the result of the research, will be prepared for each of the tasks. Copies will be made available on the National Council's website as they become available.

Task 1. ***Full Environmental Disclosure for Electricity: Tracking and Reporting Key Information.*** This report identifies mechanisms to trace transactions from generators through sellers, aggregators or marketers to retail buyers to provide consumers with full resource mix and environmental characteristics disclosure. (Available June 1, 1997)

Task 2. ***Disclosure of Fuel Mix and Emissions by Retail Electric Service Providers: Issues of Confidentiality versus the Public Right to Know.*** This report identifies the legal and policy considerations involving suppliers' requests to keep information confidential versus the public interest in having the information publicly available to consumers and others. (Available June 1, 1997)

Task 3. ***Price and Service Disclosure.*** This report presents standard options for comparing price information, risk, important contract terms and conditions, and consumer protection information.

Task 4. ***Consumer Preferences from Focus Groups.*** The report summarizes the results from consumer focus groups conducted with participants in New Hampshire and Massachusetts retail competition pilot programs. Separate focus group reports will summarize interviews with consumers in California, Washington and Colorado. (Available June 1, 1997)

Task 5. ***Baseline Tracking Survey.*** This report describes a survey instrument to gather consumer information, knowledge, attitudes and practices relevant to retail electricity purchasing practices. The report also summarizes the initial—or baseline—data on these issues.

Task 6. ***Disclosure Testing.*** This report summarizes the results of disclosure testing conducted to measure consumer acceptance, ease of use, comprehensibility and task performance.

Task 7. ***Research Synthesis.*** This final report summarizes all the disclosure-related research and makes final recommendations, including model state statutes and regulations.

The National Council's home page address is: http://www.erols.com/naruc.

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The National Council on Competition and the Electric Industry

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